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NO. 115 OCTOBER TERM, 1913

IN THE

Supreme Court of the United States

JOSEPH A. TANEY, TRUSTEE of the Estate of the MILLER PURE RYE DISTILLING COMPANY, Bankrupt

Appellant

vs.

PENN NATIONAL BANK OF READING

Appellee

Appeal from the United States Circuit Court of Appeals for the Third Circuit

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APPELLANT'S BRIEF

JOSEPH HILL BRINTON.
For Appellant.

T 98

INDEX

	PAGE
Caption	1
Statement of Case and Question Involved	1
Assignments of Error	1
Argument	3
Appendix	4
Docket Entries	34
Opinion of Archbald, *J.*	34
Opinion of Lanning, *J.*	34
Opinion of Buffington, *J.*	43
	44

Alphabetical List of Authorities Cited

	PAGE
Bank vs. Jagode, 186 Pa. 556	7
Bank vs. Staake, 202 U. S. 149	31
Barlow vs. Fox, 203 Pa. 114	25, 28
Barr vs. Reitz, 53 Pa. 256	6
Bücher vs. Commonwealth, 103 Pa. 523	12
Collins' Appeal, 107 Pa. 590	9
Clow vs. Woods, 5 S. & R. (Pa.) 277	6, 28
Conrad vs. Fisher, 37 Mo. App. 352	20, 28
Hunter Construction Co. vs. Lyons, 233 Pa. 561	6
Jenkins vs. Eichelberger, 4 Watts (Pa.) 121	9
Keil vs. Harris, 5 Cent. Rep. (Pa.) 865; 4 Sadler Supreme Ct. (Pa.) 201	20, 26, 27
Millbourne Mills Co., *In re* (C. C. A.) 172 Fed. Rep. 177	7, 8, 11, 32
Miller vs. Browarsky, 130 Pa. 372	20, 26
Moors vs. Jagode, 195 Pa. 163	7
National Bank vs. Sherer, 225 Pa. 470	12
Rosenbaum vs. Batjer, 154 Pa. 544	27
Security Warehousing Co. vs. Hand, 206 U. S. 415	7, 32
Sloan vs. Johnson, 20 Pa. Sup. Ct. Rep. 643	28
Union Trust Co. vs. Trumbull, 137 Ill. 146	20, 29
United States vs. Thirty-six Barrels, 7 Blatch. 459	19
White vs. Gunn, 205 Pa. 229	28
Witten vs. United States, 143 U. S. 76	19, 30

IN THE

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October Term, 1913. No. 115

JOSEPH A. TANEY, TRUSTEE OF THE ESTATE OF MILLER PURE RYE DISTILLING COMPANY

Appellant

vs.

PENN NATIONAL BANK OF READING

Appellee

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE AND QUESTION INVOLVED

The Miller Pure Rye Distilling Company, a corporation of the State of Pennsylvania, was engaged in distilling whiskey near Reading, Pennsylvania. The company stored its whiskey in its distillery warehouse on the premises.

On August 27, 1907, the company gave its note for four months for $2500 to the Penn National Bank of Reading, and executed and delivered to the bank, as collateral security, three so-called warehouse receipts and gauger's certificates covering 200 barrels of its own whiskey stored in its warehouse, of value considerably in excess of the face of the note. The note contained the usual collateral clause providing for sale upon default.

On December 4, 1907, the company made an assignment for the benefit of creditors. On February 3, 1908, the pres-

ent bankruptcy proceedings were instituted by the filing of a creditor's petition.

The note was not paid at maturity and the whiskey was accordingly exposed for sale and bought in by the bank on February 5, 1908.

After the Trustee in Bankruptcy was appointed the bank petitioned the Court for an order upon the Trustee to deliver to it the said whiskey. The Trustee denied the title of the bank, and upon hearing before the Referee it was held that the mere skeleton of a pledge existed and that the bank had acquired no title.

Upon appeal to the United States District Court this order was reversed, and upon appeal to the Circuit Court of Appeals, of the Third Circuit, Judges Archbald, Lanning and Buffington sitting, the District Court was reversed, Judges Archbald and Lanning holding that no title had passed upon delivery of the so-called warehouse receipts. Judge Buffington dissented and opinions by all three judges were filed. Later the Court, upon its own motion, ordered a re-argument of the case at bar and also the case of Isaac N. Boarts, Trustee in Bankruptcy, of the Foxtown Distilling Company vs. J. M. Selden & Company in appeal from the District Court of the United States for the Western District of Pennsylvania, No. 1423, Judges Gray, Lanning and Buffington sitting. The Court affirmed the District Court, Judge Gray writing the opinion.

The opinions of Judges Archbald, Lanning and Buffington are appended hereto, since they were taken out of the office of the clerk by one of the judges at the last hearing and misplaced, and do not appear on the transcript of record.

The question involved is as follows:

(a) May a distilling company manufacture and place whiskey in its own distillery warehouse and transfer title thereto upon sale or pledge, by delivery of its own receipts?

ASSIGNMENT OF ERRORS

And now, July 21st, 1911, comes Joseph A. Taney, Trustee of the Estate of Miller Pure Rye Distilling Company, Bankrupt, respondent-appellant, by his counsel J. H. Brinton, Esq., and respectfully represents that he feels himself to be aggrieved by the proceedings and decree of the United States Circuit Court of Appeals for the Third Circuit, in the above entitled cause and assigns error thereto as follows:

First.—The learned Court erred in entering the following order on June 21, 1911, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 1355. March Term, 1910

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt,

Appellant

VS.

PENN NATIONAL BANK OF READING,

Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be. and the same hereby is, affirmed with costs.

W. M. LANNING
Circuit Judge

Philadelphia, June 21, 1911

Second.—The learned Court erred in not finding and holding that the attempted pledge was fraudulent and void as to the creditors of the pledgor, and that the title of the appellant was superior to the title of the appellee.

Third.—The learned Court erred in not reversing the judgment and decree of the Court below.

Fourth.—The learned Court erred in not finding and holding that the District Court for the Eastern District of Pennsylvania had not jurisdiction in this cause.

Fifth.—The learned Court erred in not finding and holding that the United States Circuit Court for the Third Circuit had exclusive jurisdiction to hear and determine this cause.

J. H. BRINTON
Attorney for Appellant

ARGUMENT

The Miller Pure Rye Distilling Company owned a distilling plant and erected thereon a warehouse for the storage of its own product, which, from time to time, it stored therein under the supervision of the Government. The bank received a warehouse receipt for 200 barrels of the whiskey as collateral security for a loan of $2500, the receipt being in the following form:—

No. 5454. 25 bbls.

FIRST DISTRICT OF PENNSYLVANIA

UNITED STATES INTERNAL REVENUE
DISTILLERY BONDED WAREHOUSE

OF

MILLER PURE RYE DISTILLING COMPANY

Ryeland, Berks County, Pa.
August 26, 1907.

Received on storage *from ourselves* twenty-five (25) barrels of Miller Pure Rye Whiskey distilled, marked and numbered as per record attached; *subject to our order and risk* of loss or damage by fire, the elements, leakage, evaporation, or accident. Deliverable only upon surrender of this certificate, payment of tax and other charges due thereon and storage at the rate of five cents per barrel per month from August 26th, 1907, inspection Spring 1907 stored in warehouse No. 2, Serial Nos. of packages 7964/7988.

MILLER PURE RYE DISTILLING CO.
S. V. NAGLE, *President.*

Address all communications to the Miller Pure Rye Distilling Company, Philadelphia, Pa. Special Notice. Particular care should be taken of this certificate, as the whiskey *cannot be delivered without its surrender.*

The whiskey in question was placed in the distillery warehouse of the company in the usual manner, and as is shown by the warehouse receipts, the company retained physical possession and control of the whiskey and received

for its own use the charges for storage, except in so far as the Government's interest is concerned in the protection of its taxes.

The whiskey ordinarily could not be subject to the pledge in the absence of an actual or constructive delivery. It was not set apart in the warehouse, no mark or tag was placed upon it to indicate the pledge, nothing appeared on the books of the company, and no other step was taken or attempted to negative the apparent ownership of the bankrupt company in whose possession and under whose control the whiskey was when the trustee took charge. No notice was posted on the warehouse, inside or out, or on the premises, and no notice was served at the Internal Revenue office.

Where the pledge is left in the possession of the debtor, the burden of proof that there was a constructive delivery is upon the creditor claimant.

Barr vs. Reitz, 53 Pa. 256.
Hunter Construction Co. vs. Lyons, 233 Pa. 561.

Fundamental Propositions of Law

Certain rather fundamental propositions of law were considered by Judge Gray in the Court below which may be conceded to be unassailable:

Pennsylvania has adopted the English rule "that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent."

It is necessary not only that appearances should agree with the real state of things, but also that the real state of things should be honest and consistent with public policy and that it afford no unnecessary facility for deception.

Clow vs. Woods, 5 S. & R. (Pa.) 277.

Where possession has been withheld pursuant to the terms of the agreement some good reason for the arrangement besides the convenience of the parties should appear, since public policy requires change of possession.

Where the subject of the sale or pledge is in the possession of a third party as bailee, constructive delivery is sufficient.

The law of Pennsylvania controls, and the courts of that State have universally held that a man may not be his own warehouseman.

Bank vs. Jagode, 186 Pa. 556.
Moors vs. Jagode, 195 Pa. 163.
Security Warehousing Co. vs. Hand, 206 U. S. 415.
In re Millbourne Mills Co. (C. C. A.) 172 F. R. 177.

The Court below relies upon certain elements in the case at bar as constituting a constructive delivery, thereby removing it from the operation of the general rule, which may be summarized as follows:

1. The impossibility of physical delivery of the property by reason of the control thereof by the United States Government.

2. Constructive symbolical delivery by means of an alleged warehouse receipt.

3. The custom of the trade sanctioning such distillery warehouse receipts.

4. The injury to the trade which would result from declaring this custom illegal.

APPELLANT'S CONTENTIONS

Per contra, the appellant contends that—

1. Either actual delivery by payment of tax and release of the whiskey for that purpose, or constructive delivery by removal to a general bonded warehouse and delivery of its warehouse receipt, was practicable, but neither means was adopted.

2. No constructive or symbolical delivery could be or was made by the so-called warehouse receipt given to the appellee.

3. The alleged custom of the trade, being contrary to public policy, cannot be sustained.

4. Individual interests arising from such a custom must suffer the consequences when the courts hold that they exist contrary to public policy.

In the Millbourne Mills case (*supra*), the Court said:

> "The certificates admittedly cannot be sustained as warehouse receipts, however they may bear that form. A man cannot make a warehouse of himself as to his own goods."

It follows, therefore, that as a matter of public policy in the prevention of fraud, possession must accompany the conveyance. Where the goods are stored in a public warehouse, the convenience of parties, as well as public morals is served, since the warehouse receipt is given by the bailee. In the State of Pennsylvania, the courts, in coming to the conclusion that a man may not be his own warehouseman, predicated it upon public policy since the opportunity for fraud is even greater than if no semblance of a warehouse is maintained. In conducting his own warehouse the owner could issue as many fraudulent and conflicting so-called warehouse receipts as he might desire.

In *Collins' Appeal*, 107 Pa. 590, the Court said:

> "Possession of the subject of the pledge is an almost universal requirement of the law of pledge to perfect the pledgee's title. It may be dispensed with in certain cases, but the current of the authorities is that in such cases there must be a substitute for it in the way of transfer of the title in such manner that the pledgee can exercise a right of possession without any further act of the pledgor."

THE CONVENIENCE OF THE PARTIES IS NOT OF MOMENT

> "To tolerate a lien (said GIBSON, C. J. *Jenkins vs. Eichelberger*, 4 Watts, Pa. 121) severed from possession by any device whatever, would be pregnant with all the mischief of colorable ownership, and to sanction it at the expense of the community would be justified by the accomplishment of more important objects than individual accommodation."

Therefore the question here raised is whether or not a distinction exists in favor of a distillery warehouse, whereby the owner is not within the general rule that, in so far as the transfer of title to the contents is concerned, a person may not be his own warehouseman. The claim of the Bank, which was sanctioned by the District Court, was that a distillery warehouse, so far as the transfer of title is concerned, is in the custody and control of the Government, and that therefore the Government is in fact a warehouseman to whom the whiskey was bailed. Judge GRAY, of the Circuit Court of Appeals, in affirming the decision of the District Court, ratified this view by saying (Record page 40):

> "That such control (Government control) was exclusive is apparent from the provisions of the law as above pointed out, and it seems little less than ab-

surd to say that the distiller was in possession of this property when he could have been put in prison if he had attempted to take possession of it."

This view, however, disregards the purpose of the rule, and does violence to the limited power exercised by the Government.

The Real Test is One of Public Policy

The question, after all, is not what rights as to possession the owner may have exercised, as between himself and the Government, but what opportunity he had of creating secret liens to the prejudice of the innocent and credulous.

Several States of the Union, either by statute or common law, have recognized the negotiability of warehouse receipts in furtherance of commercial convenience. Goods and merchandise are deposited and the warehouse issues therefor a receipt declaring that it is the bailee of the goods specified therein and that it will deliver the same upon payment of proper charges *to the holder thereof*. The goods are kept distinct and the receipt is the *indicia* of title, and is pledged or sold as the owner may desire. In an ordinary sale or pledge the law has safeguarded the interests of the public by prohibiting secret liens and requiring the goods to be delivered or set apart and placarded sufficiently to advise the wary. The necessity for the rule ceases where the goods are placed in a warehouse, since the receipt represents the goods and without it they cannot be obtained. Therefore possession of the receipt is all important. In other words, the policy of the law may be stated to be, that in the absence of opportunity for fraud, no restriction is placed upon the free transfer of personal property. Delivery of possession is usually required so as to prevent fraud in the resale or repledging, but when stored in a warehouse the receipt becomes

the sole evidence of title and the opportunity for fraud is wanting. Where, however, the title to the goods and the title to the warehouse merge, the owner is put in a position to issue without restriction receipts for the same goods to different persons, and this was accordingly enjoined by the courts whenever the question was raised, in furtherance of public policy; and the general rule was adopted that a man may not be his own warehouseman. Putting the matter differently, the old rule requiring possession or its equivalent to accompany title was relaxed in favor of goods in warehouses because the danger of fraud was eliminated, but that relaxation did not extend beyond the reason of the rule. When the opportunity for fraud arose, the relaxation ceased.

It seems to be generally conceded, as was said by Judge McPherson in the United States District Court (Record, p. 23):

> "Save in one respect this case cannot be distinguished, I think, from *re Millbourne Mills Co.* (CCA) 172 F. R. 177, and unless the distinction justifies the application of a different rule the order of the Referee was right. In my opinion, however, a material difference between that case and this is to be found in the fact that the pledged property here was stored in a bonded warehouse established and maintained under the laws of the United States. It is true that the whiskey did not cease to belong to the company simply because it was stored in the warehouse."

As has been said, the District Court held that the Government was a bailee. Upon appeal to the Circuit Court of Appeals, Judges Archbald and Lanning held that the intervention of the Government was really a matter of the convenience of the distiller, the Government exercising a police oversight. Judge Archbald said (Appendix, p. 36):

"A building erected by a distiller on the distillery premises pursuant to the statute has none of the characteristics of a warehouse where goods are received and stored for pay, as that term is understod and applied. *Bucher vs. Commonwealth,* 103 Pa. 523. *National Bank vs. Sherer,* 225 Pa. 470. And so denominating it only results in a confusion of terms. It is nothing more or less than a place where the products of a distillery may be securely stored subject to the supervision of the officers of the Government under bond, until the taxes are paid. The arrangement is primarily for the convenience of the distiller, the spirits being allowed to age and payment of the tax meantime being deferred, the Government being protected by the bond given to the Collector, and the assignment of a storekeeper to watch it, without whom nothing can go out or in."

That Court further held that should the distiller desire to sell or pledge whiskey the Act of Congress of August 27, 1894, Sections 51 and 52, 28 Statutes, 564, afford ample relief, the effect of which will be considered hereafter, and in this opinion Judge Lanning concurred.

A Distiller May Store in a General Warehouse

If it were a fact that the distiller is required to furnish his own warehouse in which the product must be stored, it might be necessary to consider the hardship thus imposed upon the distiller in hampering the disposal of his property in comparison with public policy in countenancing the fraud which usually prevails arising out of duplication of warehouse receipts.

It is fair to assume that the Government, recognizing the imposition upon the innocent public, passed the Act of August 27, 1894, Sections 51 and 52, 28 Statutes, 564, which reads as follows:

"That the Commissioner of Internal Revenue shall be, and is hereby, authorized, in his discretion and upon the execution of such bond as he may prescribe, to establish one or more warehouses, not exceeding ten in number in any one collection district, to be known and designated as general bonded warehouses, and to be used exclusively for the storage of spirits distilled from materials other than fruit, each of which warehouses shall be in the charge of a storekeeper or storekeeper and gauger to be appointed, assigned, transferred and paid in the same manner as such officers for distillery warehouses are now appointed, assigned, transferred and paid. Every such warehouse shall be under the control of the collector of internal revenue of the district in which such warehouse is located, and shall be in the joint custody of the *storekeeper and proprietor* thereof.

Prior to the passage of this act distillers had no means of passing title to their own product without first paying the Government tax, thus relieving it of Government surveillance. By virtue of this act, however, a distiller became enabled to transfer his distilled spirits from his private warehouse to a general bonded warehouse, thus placing it in the exclusive custody of a third party, who issued a warehouse receipt therefor, which warehouse receipt became freely negotiable.

So far, therefore, as reason and justice are concerned, a distiller is in no different class from a miller. If he deposits in a general warehouse all question is eliminated, since the *proprietor* becomes the bailee *and he issues the warehouse receipts,* and opportunity for fraud is eliminated. The difference is material. If a distiller establishes his own warehouse he may issue the receipts to purchasers or pledgees for a consideration. If this is sufficient to pass title without separation of the property or notice of any kind

there is nothing to prevent the distiller from issuing any number of such receipts to any number of innocent persons who have no means, therefore, of making satisfactory inquiry. In the case of ordinary personal property a person may, upon inquiry, obtain knowledge of the title, yet the policy of the law has always been that since this too easily opens the door for fraud, possession or its equivalent must indicate title. Certainly, therefore, where inquiry is denied, *a fortiori* title could not pass. It must be conceded that the greater the Governmental restrictions the more difficult would it be for the innocent public to ascertain the truth as to title, and the more easy would it be for the crafty distiller to deceive it. This being true, it would be unconscionable to suppose that the Courts would sanction such an opportunity for fraud simply because the federal regulations require supervision for the purposes of taxation when in the absence of such regulations public policy intervenes.

The present case amply illustrates this danger. The Trustee upon taking possession found about 4000 barrels of whiskey stored in the company's warehouses in the name of the company as distiller, and warehouse receipts for over a thousand barrels of this whiskey had been sold or pledged to at least two different persons, and in some instances to four or five different persons, each of whom believed himself to be an innocent holder for value, and the fraud perpetrated was general and extensive, covering possibly thirty thousand dollars' worth of whiskey, and when it was discovered the guilty president of the company, who issued the receipts, committed suicide. If the whiskey had been stored in a general warehouse this fraud could not have been perpetrated, and surely, if the principle that public policy *to prevent fraud* requires delivery of personal property to pass title, has not been devitalized, it should be invoked in the present case. This aspect of the matter seemingly did not impress itself upon the learned District Judge, for he said (Record page 26):

"But how then is this property to be dealt in? Is the owner to be debarred from deriving any benefits from it unless he can find a buyer or creditor who is ready to take immediate possession? It is well known that spirits would lose much of their value if they could only be sold under such a restriction, and it is therefore not surprising to find that the natural expedient has been adopted, of substituting warehouse certificate or storage receipts in place of the whiskey itself. As the Government is in effect a bailee, the situation is practically the same as in the case of ordinary articles deposited in a storage warehouse of the usual character. In such event the storage receipts may be freely sold or pledged, *and there seems to be no good reason why similar receipts for bonded spirits should not have the same position in the markets of the country.*"

TRADE NECESSITY

Speaking generally, it is quite true that there is no more reason for suppressing warehouse receipts for whiskey than there is for suppressing warehouse receipts for flour and taking them out of the markets of the country, but it is equally true that there is no more reason to encourage fraud by permitting a man to issue warehouse receipts for whiskey stored in his own warehouse than there is for flour stored in a similar manner. So far as the present inquiry is concerned, it is respectfully submitted that the question is *not* what supervision the Government may or may not choose to exercise since it is done to protect the Government's right to the tax and for the convenience of the distiller. The public, therefore, is not interested and *per se* it has nothing to do with the case. *The real question is, what restrictions are placed upon the distiller that put him in a different class?* Certainly he is not coerced as to the warehouse, since he may construct his own or place the whiskey in a general bonded ware-

house at his pleasure, quite the same as any other merchant can do. If he selects the latter he forfeits the power to issue warehouse receipts, or if the former he may issue them without limit. In this he does not differ from any other merchant, especially in view of the fact that the Government recognizes only the distiller to whom he makes delivery, irrespective of the assignment of the so-called warehouse receipt.

In repetition it is vital to bear in mind that since the Court, for reasons of public policy, will not permit a man to be his own warehouseman and pass title by delivery of receipts, and thus afford an opportunity for duplication and fraud, the present inquiry seems to narrow itself down to the one question,—whether or not the supervision of the Government lessens the danger of such fraud. The District Court held that the Government is a bailee, but it is clear that in the one respect essential to prevent fraud, it is in no sense a bailee for *it does not issue or control the issue of warehouse receipts and keeps no record of change of ownership.*

But even generally speaking, the Government cannot be said to be a bailee. It issues no receipts, recognizes no transfer of title or other interest, assumes no responsibility, and is not chargeable with negligence. It lays a heavy hand upon the distiller as well as upon the product, and exacts a substantial bond, and the distiller alone is held accountable. He is permitted to construct his own warehouse on the distillery property should economy dictate, or he may make use of a general warehouse, but the vigilant eye of the law rests as constrainedly upon the distillery as it does upon the bonded product, and if for the convenience of the distiller the law should recognize an exception and permit him to pledge or convey title to the whiskey in his own warehouse, it follows as a logical conclusion that the same should extend to the plant or any part of it; yet no one would urge that simply because the Govern-

ment exercises a vigilant oversight in the enforcement of taxation, a distiller could effectually pledge the grain in the vat or any of the appliances in the distillery without placarding it or otherwise giving notice.

The Federal Government exercises the same control over the distillery as it does over the warehouse proper. The Internal Revenue Acts of the United States (Sections 3267 to 3276, 3287 to 3288, 3293, 3292 A, 3301 to 3303 of the Revised Statutes) provide for the warehouse construction and custody and control thereof by the Government. The receiving cistern and the room in which the same is placed are in charge and under the lock and seal of the Internal Revenue gauger. The locks and seals are provided by the Government, and the key is in charge of the collector and gauger. The drawing off of spirits must be under the supervision of the gauger and in the presence of the storekeeper. Very exacting provisions are required with reference to the still, the locks and seal, and generally as to the entire distillery. In short, the Government, in order to proscribe illegal distilling, exercises supervision, control, and to a certain extent, custody of the distilling plant and its accompanying warehouse from the first to the last stage of distilling, and it would be as reasonable to hold that title would pass by delivery of a bill of sale or warehouse certificate where whiskey is stored in the barrel house or other portions of the distillery plant as to hold that the title would pass where the whiskey is in the warehouse. Very similar police control exists in both instances, and the Government is undoubtedly in control.

Distillers seem as ready to respond to the temptation of fraud as any other class of persons, and the trustee is confronted with manifold difficulties in the case at bar. True it is that no fraud is thus far revealed as to the two hundred barrels of whiskey in question, but surely that cannot even tend to justify the principle of law laid down by the lower Court. If title can pass by delivery of such receipts where

there is no duplication, it must pass where there is duplication. Many persons hold different receipts for the same whiskey, they are all innocent holders for value, and must suffer for their credulity.

As to the effect of the Act of 1894, Judge ARCHBALD said (Appendix, p. 37):

> "And wherever bonded warehouses of this character exist, as was the case here, every distiller of the district has a place entirely separate and distinct from his own establishment where the produce of his distillery can be removed and stored in bond with the same advantage as if stored in a distillery warehouse of his own and where they may be sold or pledged by means of warehouse receipts which cannot be questioned, without the necessity of resorting to receipts of his own, which are only such in name. In his own warehouse, by contrast, except only as they are in ward to the Government for payment of taxes, the goods are practically in the distiller's own hands. The storekeeper is a mere watchman to see that they do not get away and all the checks imposed and supervision provided for, are directed solely to that end. At any time, and as to any goods, the distiller may pay the tax and remove them, and there is nothing to stand in the way. No one else but the distiller, whatever his *indicia* of title, is recognized and no one but he can intervene. The statute expressly declares that the goods are in the joint custody of the Government, storekeeper and the distiller, and the Government's custody necessarily ends when the purpose of it has been subserved, leaving that of the distiller supreme. Not only is this the law, but it is the established practise as well. The goods in the distillery warehouse being thus on the premises and in the possession of the distiller, and, once the tax is paid, subject to his entire control, there is no place for a delivery, actual or constructive, necessary to complete a

pledge. In no sense are the goods bailed to the Government, so as to permit constructive delivery to be made. The authorities are clearly opposed to any such idea. As is said in *United States vs. Thirty-six Barrels*, 7 Blatch. 459,

" 'The act nowhere in terms provides that the Government Inspector shall have any possession, custody or control of the spirits, but only a custody of the warehouse, jointly with the owner. This is given to the inspector through his participation in the custody of the warehouse and by the discharge of his duty to keep the same locked, when not personally present, as a means of guarding against illegal removal of spirits, but (it) invests him with no legal possession thereof. Whatever custody or control he has over the spirits is purely incidental, or a consequence of his joint custody of the place where they may happen to be, and he has not, as a legal proposition, custody of the spirits themselves. In point of law the owner of the spirits and the owner of the warehouse wherein they are stored is in possession of the spirits. All that the statute has done is to throw around his ownership, possession, custody and control, a surveillance and joint custody of the warehouse as an obstacle to the accomplishment of any fraud the owner may intend and desire to effect.'

"So in *Witten vs. United States*, 143 U. S. 76, where the distiller was held liable for the tax, notwithstanding that the spirits had been stolen, it is said:

" 'Under the requirement of the Internal Revenue Laws, the warehouse was provided by the owner of the distillery at his own expense, and on his own premises, and although declared to be a bonded warehouse of the United States, and required to be under the direction and control of the collector of the district and in charge of a Government storekeeper, was in the joint custody of the storekeeper and the owner. The deposit of the

spirits in the warehouse was solely for the benefit of the distillery, and to enable him to give bond for the payment of the tax on the spirits instead of paying the tax at once. The Government assumed no responsibility to him for their safe keeping.'

"The distillery warehouse, in the present instance, therefore, having none of the characteristics of a warehouse proper, and the supervision and control of the collector over the whiskey contained in it, in no sense constituting a bailment, the attempt to pledge it, by the issuing by the distiller of so-called warehouse receipts, was of no effect, no matter how specifically the property may have been described in them, nor how fully backed up by gauger's certificates they may have been. It was held in *Union Trust Company vs. Trumbull* 137 Ill. 146, that it is only as to goods in a public warehouse, that a symbolic delivery by means of warehouse receipts can be made; and that the warehouseman issuing the receipts must have the goods in his possession or control, to make the receipts amount to a delivery of the property for which they stand. And in *Conrad vs. Fisher*, 37 Mo. Appeal 352, where, as here, a distiller, in the attempt to create a pledge, issued receipts against whiskey in bond in his own warehouse, the receipts were not good. Nor does the case of *Miller vs. Browarsky*, 130 Pa. 372, in any respect sustain the contrary view. * * * Neither is *Keil vs. Harris*, 5 Cent. Reports Pa. 865, necessarily the other way. It was assumed in that case that by the deposit of the whiskey in the warehouse of the distiller, there was a bailment to the Government, which as we have seen, is not so, and it is upon this mistake in assumption that the case proceeded, but, in addition to that, the defendant, who held the certificates which were sustained, had paid the tax on the whiskey and procured

it to be delivered to him, against which the plaintiff had merely an attempted levy and sale. * * *

"It is said that there is a custom in the distillery business to issue certificates against spirits under bond in distillery warehouses, by means of which they are freely sold and pledged and that serious consequences will follow if this is not upheld. When the spirits are in the warehouse proper, either such as is provided by Act of Congress, or recognized by the State law, so that it be not that of the distiller himself, such certificates no doubt are good. But where the goods are in the distiller's own hands and the attempt is made to sell or pledge them by so-called warehouse certificates or receipts, issued by the distiller alone, a custom relied on flies in the face of the law and cannot be observed. A possibility of duplication and fraud, of which there are examples enough in the books, to say nothing of what is reported to have occurred here, is sufficient to condemn the custom if there was nothing more. But without resting on this, the goods against which such certificates are issued, being in the distiller's own hands at the time, and (save only that the taxes must be paid) being under his complete control, there is no such delivery, either actual or constructive, by the mere putting out of receipts, as the law requires, to make an effective sale or pledge. The specification of the goods, in the same terms in which they are described in the storekeeper's or gauger's books, does not help out the receipts. It is not a matter of description, but of control, and neither does the attaching of the gauger's certificates, which are merely evidence that the goods are there. The gauger's certificates neither convey title, nor bind the goods, nor do they necessarily check the duplication of receipts. Neither gauger, storekeeper, or collector, when once the taxes have been paid, can restrain the distiller, no matter what receipts or certificates are

known to be out, from disposing of the goods in the distillery warehouse to whomsoever he may choose."

Judge LANNING, concurring, said in part (Appendix page 43):

"The distiller can obtain from no other person warehouse receipts for his spirits stored in his own distillery warehouse, for there is no other person in possession of the spirits to give the receipts; but he may obtain such receipts from the proprietor or operator of a general bonded warehouse for the spirits he has stored therein, and by transferring the receipts he may make constructive delivery of the spirits therein described."

The above is a clear and careful statement of the law meriting consideration, and is, in a measure, recognized by Judge GRAY in the Court below. He there says (Record page 37):

"The excise tax on whiskey is one of the most fruitful sources of revenue possessed by the Federal Government, and the Internal Revenue laws and the Treasury regulations made in pursuance thereof, provide for and safeguard its collection with the most scrutinizing care and particularity. It is well known that a marketable product is not the result of mere distillation of the liquor from grain or fruit. In fact, its change into such a product may be said to be hardly begun when it makes its appearance in the tank or cooling vats. It requires to be skillfully cared for and ripened, and for the ripening process it is necessary that the whiskey should be stored in wood for several years. The tax on whiskey is remarkable and distinguished from other excise taxes by the fact that it is in amount many times the cost of the whiskey itself, the tax of $1.25 a gallon being about five times the ordinary value of the whiskey at the still. It is manifest that this

extraordinary tax could not be collected on the whiskey as it comes from the still, or when it is first put in barrels, without hardship to the distiller or owner so great as to discourage its manufacture or confine such manufacture to persons or corporations of great wealth. It was necessary, or at least very desirable in the interest of the public revenue, that reasonable opportunity should be given to the distiller, to allow the product of his distillery to become marketable by the ripening process alluded to, before it was called upon to pay the tax. As this involved quite a number of years, the Government, for the convenience of the distiller as well as for the protection of its own revenue, has provided by law for the custody and control of the whiskey from the time it leaves the still until, being properly aged, it has become marketable, or until it is convenient for the distiller or owner to pay the tax thereon and withdraw the same from such custody. Where the amount of the tax is so much out of proportion to the value of the whiskey, a great temptation is presented to evade the payment of the same. To guard against this, the Government by most carefully framed provisions of law and regulations, takes charge of the liquor from the time it appears from the still until it is withdrawn from its custody by the distiller or owner upon payment of the tax."

Public Policy as Opposed to Individual Interest

The Government, having made ample provision for the protection of the distiller, found it was necessary to protect the public, owing to the numerous frauds practised almost generally throughout the United States by duplication of so-called warehouse receipts. In order that both the Government and the public might be protected, the Act of 1894 was passed, whereby the distiller could defer the pay-

ment of tax and permit his product to ripen, but denied to him the opportunity of preying upon the credulous public. It is therefore in furtherence both of the convenience of the distiller and the protection of the public, that warehouse receipts should be negotiable only where the whiskey is deposited in a public bonded warehouse.

With this view, however, Judge Gray takes issue and holds that under both the law of the State of Pennsylvania and of the United States *sui generis*, the free transfer of title to whiskey in distillery warehouses should be encouraged, and that public policy should give way to the convenience or advantage of individuals.

Judge Gray has urged that the practical effect of a different conclusion would be "to cripple the distilling interest by preventing the sale or pledge of product in bond."

It must be conceded, however, that a vicious practice has arisen out of convenience merely, whereby many are accommodated, but it is pregnant with opportunity for fraud, and many are deceived thereby. True, at this time, those honestly enjoying the privilege outnumber the unfortunate and innocent victims, but the fraud perpetrated is by no means insignificant. Two cases in addition to the case at bar are now pending, or have been recently decided, one in Maryland and one in Ohio (above referred to), where the cumulative fraud embraces spirits of a value exceeding one-half a million dollars. Where the fraud reaches such proportions, it is submitted that the Court should decline to countenance such an insidious practice, or indeed to *indulge in comparative equity* by saying that at this time the injury to the liquor traffic would exceed that inflicted upon unfortunate and defrauded purchasers. Such reasoning would seem to outrage that time-honored and uncompromising attitude of justice whereby public policy or welfare is so jealously safeguarded, and out of which the entire law of

personal property arose, calling forth as early as 13th Elizabeth a diatribe against secret liens on personal property, which tended "not only to let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

The injury to the liquor traffic so elaborately dwelt upon by interested counsel is imaginary rather than real, and is indeed a weak support for a principle of law affording so widespread an opportunity for fraud and deceit. It is urged that the trade would be injured, and therefore the Court should countenance a practice running counter to public policy. This injury, if real, could and would be corrected by proper legislation requiring the counter signature of some person in authority, in control of the warehouse, or some other simple provision entirely safeguarding the interests of the public. Indeed such fraud is not possible in the State of Pennsylvania since the passage of the Act of May 16, 1901, P. L. 194.

The appellees further complain that the decision in this case would overthrow the title to large quantities of distilled spirits now in bond, and that the loss would be enormous. But this is far from correct, since such purchasers would be entitled to withdraw the spirits so purchased or to receive back the purchase money paid.

The Law of the State of Pennsylvania

In *Barlow vs. Fox*, 203 Pa. 114, the Court said:

> "Delivery must be actual and not merely symbolical where actual delivery is practicable, and if it is not practicable the party should leave nothing undone to secure the public from deception."

Three courses are open to the election of the pledgee, however:

(a) He may secure the payment of taxes and obtain physical possession of the whiskey, thus obviating the possibility of fraud.

(b) He may have the whiskey deposited in a general warehouse and obtain possession of the warehouse receipt issued by the proprietor therefor, thus avoiding the possibility of deception or fraud.

(c) Fossibly it would be sufficient for him to accept a warehouse receipt issued by the pledgor for whiskey in pledgor's possession and under his control with notice by posting on the premises, in the books of the company and to the Internal Revenue department.

It remains to inquire what the attitude of the Supreme Court of Pennsylvania is with reference to warehouse receipts for spirits stored in bonded warehouses. This question was first presented to that Court in the case of *Keil vs. Harris*, 4 Sadler's Pa. Supreme Ct. 201, where in a *per curiam* opinion the Court seems to have misconceived the nature of the transaction and to have regarded the delivery of the whiskey to the warehouse as a bailment to the United States Government, the Court saying:

> "It is a well settled fact where *personal property is in the hands of a bailee*, a transfer by *bill of sale* alone is good and valid as against the creditors of the vendor."

In *Miller vs. Browarsky*, 130 Pa. 372, the Court seems to have come to a different conclusion.

In that case a person purchased whiskey in a bonded warehouse from the distiller, but did not remove it or pay the tax thereon, although he paid the purchase money in full. The distiller subsequently sold the whiskey to a second party, who was without knowledge of the first sale, but who paid the tax and withdrew the whiskey. The Court held that the first purchaser was guilty of laches by suffering the dis-

tiller to exercise the power to re-sell the whiskey to an innocent purchaser for value. The Court there said:

> "It is clear that but for plaintiff's laches Jones would not have been able to sell the whiskey the second time; and the rule is well established that where one of two innocent parties must suffer a loss, such loss must be borne by the person whose neglect was the occasion of it. The plaintiff left the whiskey absolutely under the control of Jones, when, by reasonable caution, he could have placed it beyond his power to re-sell it. The defendant was a good faith purchaser, without any knowledge of the prior purchase and of the fraud of Jones. Having so purchased the whiskey, paid the tax, and taken it out of bond, we see no reason why he did not get a good title."

The logical conclusion derived from this case is that it required something more than the mere delivery of the warehouse receipt or bill of sale to convey title to the purchaser, which is in direct conflict with the case of *Keil vs. Harris (supra)*.

This question was next presented to the Supreme Court in the case of *Rosenbaum vs. Batjer*, 154 Pa. State 544. There a distiller issued to defendants certificates that he had on storage for their account fifteen barrels of whiskey which would be delivered on presentation of certificate and endorsed same to the order of the purchaser. The purchaser then sold the whiskey to plaintiff, endorsing the certificate with his name. The whiskey was never delivered, and remained in the warehouse where it had been stored by the distiller. After the last sale, defendants attached the whiskey as the property of their own vendee, and it was held that the defendants, by endorsing the certificates, estopped themselves from objecting to the title which the plaintiff had acquired from defendants' own endorsee.

The syllabus of that case as to the Act of 1886 is: "Query—Whether a distiller's certificate that he holds whiskey on storage for the account of another is within the Warehouseman's Act of September 24th, 1866 (P. L. 1867) 1363."

Pepper & Lewis, in the Digest of Decisions on this question, state that it is doubtful whether the title to whiskey is given by delivery of such receipts.

The only other case in the State of Pennsylvania in an appellate Court is *Sloan vs. Johnson*, 20 Pa. Superior Court Reports 643, but there the question of the title to whiskey in a bonded warehouse based upon warehouse receipts was not raised.

It follows, therefore, that in this State at least the question as to the validity of such warehouse receipts is open.

In the case of *White vs. Gunn*, 205 Pa. 229, the Supreme Court said:

> "It is as true now as it was when the rule was first announced in that case (*Clow vs. Woods*, 5 S. & R. Pa. 575), nearly a century ago, that if a purchaser pays the price for the goods purchased by him, without taking possession of them, he takes the risk of the integrity and solvency of his vendor when the rights of a subsequent *bona fide* purchaser or an execution creditor arises."

In *Barlow vs. Fox*, 203 Pa. 114, that Court said:

> "There has been no deviation from the general rule that delivery of possession is indispensable to transfer a title by the act of the owner, that shall be valid against creditors."

In *Conrad vs. Fisher*, 37 Mo. Appeal 352, this question was raised and ably discussed, and the Court finally concluded that a distiller could not pass title to whiskey in his

own warehouse by delivery of receipts merely. The same doctrine is laid down in *Union Trust Co. vs. Trumbull,* 137 Illinois 146.

The Law of the Federal Courts as to Warehouse Receipts

The second reason assigned by the dissenting opinion in the case at bar is that the opinion of the Court as recorded is not in harmony with the federal decisions in this circuit in bonded warehouse cases.

This question has not been before raised in this circuit, but it is respectfully submitted that with the exception of the case of Boarts, Trustee vs. Selden (now pending), neither this nor cognate questions have been in harmony with the dissenting opinion either in the conclusion reached or in the principles underlying it.

At the very threshold of this case the character of the Government supervision must be determined. Either the Government, on the one hand, takes possession of the product of the distillery, to the exclusion of all persons, and becomes a bailee, or, on the other, it exercises an oversight in the nature of police control, and cannot be deemed to be in any sense a warehouseman. This control is undeniably for the purpose of taxation merely, since the tax may be paid at any time after the spirits are distilled, and from that moment on, the spirits *cease to be contraband,* and become similar in all respects to any other commercial product.

It is urged that the gauger's certificate evidences ownership, since it accompanied the warehouse receipt. A moment's consideration, however, shows this to be error. The gauger's certificate only shows the proof of the whiskey and therefore the amount of tax due. Unless the whiskey is removed at once its quality changes, and a re-gauging is required. This is the full function of the certificate and the holder of such a certificate could not

complain if his failure to use it enabled a subsequent innocent purchaser for value to secure a later one, and pay the tax and remove the whiskey.

This introduces for consideration a further question. If it be held that a warehouse receipt is negotiable and title passes to the pledgee or vendee, it would seem that, by parity of reasoning, a subsequent, though innocent, pledgee or vendee would acquire no interest. In conflict with this, however, is the decision of *Miller vs. Browarsky (supra)*, where the Supreme Court of Pennsylvania has said that a subsequent innocent purchaser for value who exercises his right of purchase by payment of tax and removal of the whiskey, obtains a paramount title. It is respectfully urged that that decision is of binding effect upon this Court, and is the established law of Pennsylvania, which in effect is that a person who innocently purchases whiskey and takes possession of it, thereby acquires title to it, irrespective of prior existing pledges or sales, by delivery of warehouse receipts to others. This would seem to be decisive of the question at issue without further elaboration, since it follows that title cannot pass in Pennsylvania by delivery of the warehouse receipt unaccompanied by removal of the whiskey from the warehouse. This is consonant with the language of the U. S. Supreme Court in *United States vs. Witten*, 143 U. S. 76, in saying:

> "The deposit of the spirits in the warehouse was solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax on the spirits, instead of paying the tax at once. *The Government assumed no responsibility to him for their safekeeping. If he was not satisfied with the security of the warehouse, he had only to take any measure consistent with the access and supervision of the Revenue officers, to make it more secure, or else to pay the tax and remove the spirits. The only duty which the Revenue officers owed in regard to the se-*

curity of the warehouse and the safekeeping of the spirits therein, was to the Government, and not to the defendants."

RIGHTS OF THE TRUSTEE IN BANKRUPTCY

It is urged that the rights of the trustee in bankruptcy under the facts in the case at bar, rise no higher than those of the bankrupt. Section 70 of the Bankruptcy Act, and the construction placed upon it, indicate the error of such a contention. It is by no means conceded that the title to the whiskey designated in the receipts should be deemed to pass even where the holder is the direct purchaser from the distiller, because such purchaser did not contemplate a removal of the whiskey, but, on the contrary, deliberately designed to suffer it to remain in the custody and under the control of the distiller for an indefinite period of years. As between the parties, where the goods are designated and are separable, the intention of the contracting parties prevails in vesting the title in the vendee if the parties contemplate an immediate delivery of the goods. Of course, the rule is otherwise where the intention to deliver is absent. Such a purchaser, however, would have the right to recover the value of the goods, but the title could not be deemed to pass.

A very different question arises where the rights of creditors attach through the Trustee in Bankruptcy under Section 70 of the Act.

It was said in *Bank vs. Staake*, 202 U. S. 149.

> "The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it, is not applicable to liens, which, although valid as to the bankrupt, are invalid as to creditors."

It is to be borne in mind that by Section 70 *a* of the Bankruptcy Act, the Trustee in Bankruptcy is vested *by operation of law* with the title of the bankrupt to all property transferred by him in fraud of his creditors and to all prop-

erty which prior to the filing of the petition might have been levied upon and sold by judicial process against him, and by subdivision *e* of the same section the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. It was said in *Security Warehousing Co. vs. Hand*, 206 U. S. 415:

> "Here are special provisions placing the title to property transferred by fraud or otherwise, as mentioned, in the Trustee in Bankruptcy, and giving him the power to avoid the same."

In that case the Court held that holders of so-called warehouse receipts under a pledge which was invalid for want of a change of possession, had no equitable lien which took precedence to the title of the Trustee in Bankruptcy by virtue of the provisions of the Bankruptcy Act. That Court further said:

> "The method taken to store the property was as found by the District Court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts and thus raise money upon secret liens on property in the possession of the pledgor and under its control, and such scheme the Court said should not receive judicial sanction. Such a scheme under the facts and as carried out in the case, and with regard to Wisconsin law, was a fraud in fact, and neither the receipts nor the so-called pledge could be asserted against any of the creditors."

Precisely this question was raised and determined in *Bank vs. Millbourne Mills Co.* (*supra*) where it was held that the Trustee in Bankruptcy could enforce the rights of the creditors whom he represented against a pledgee where the bankrupt itself was estopped to act. Can it be said that the position of a purchaser is distinguishable? The act says:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred unless he was a *bona fide* holder for value prior to the date of the adjudication."

The first clause of the sentence is most emphatic, that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided," and if this were all, there could be no question but that the rights of the trustee rise as high as those of a creditor. The act goes on, however, to say:

> "and may recover the property so transferred or its value from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication."

This certainly contemplates an additional power, and not a limitation. It enables the trustee to recover the physical possession of property or its value where it has been transferred "unless he (the purchaser) was a *bona fide* holder for value prior to the date of the adjudication." The purpose of the clause is manifest as enabling the trustee to deal with the property of the bankrupt so as to protect the rights of creditors by asserting them with power to set aside a sale and delivery of property if made after the date of the adjudication or if lacking in good faith.

In conclusion, it is submitted therefore, that the law of conscience, which happily is safeguarded by the law of the land, as technically enunciated, calls for the reversal of the Court below.

Respectfully submitted,

JOSEPH HILL BRINTON

Counsel for Appellant

APPENDIX

DOCKET ENTRIES

TANEY, TRUSTEE VS READING BANK C. C. Appls. E. Dist Pa.
No 1355 Mch Term 1910

Feb	12 1910	Petition to superintend and revise in matters of law filed.
"	14	Transcript of record filed.
Mch	14	Printed transcript of record filed.
"	15	Brief for Appellee filed.
"	17	Brief for appellant filed.
"	15	Argued Coram Buffington, Lanning & Archbald, *J.J.*
Apl	13	Certificate of filing of petition for review issued.
"	"	Appearance for appellant and receipt.
"	"	Transferred to printed calendar.
Nov	9	Opinion of Court by Archbald *J.*, filed.
"	"	Concurring opinion by Lanning *J.* filed.
"	"	Dissenting opinion by Buffington, *J.* filed.
Feb	20 1911	Order directing re-hearing and placing case on March 1911 argument list.
Mch	1	Petition of Gibson Distilling Co., et als, for leave to intervene filed.
Apl	25	Brief for intervenors filed.
May	2	Argument coram Gray, Buffington & Lanning, *J.J.*
Jun	19	Opinion of Court by Gray, *J.* filed.
"	29	Order confirming decree filed.
Jly	21	Petition for appeal to Supreme Court filed.
"	"	Order allowing appeal and staying proceedings filed.
"	24	Assignment of errors filed.
"	25	Affidavit as to amount in controversy filed.
Aug	9	Certified copy of record issued to counsel for appellant to Supreme Ct

APPEAL FROM DISTRICT COURT FOR EASTERN DISTRICT OF PENNSYLVANIA

(For opinion of the Court below see *In re Miller Pure Rye Distilling Company*, 176 Fed. 606.)

ARCHBALD, *District Judge:* The facts appear by the opinion of the Court below (176 Fed. 606), and need not be repeated here. The question involved is whether a pledge

of whiskey in store, under bond, in the warehouse of a distiller is effective, without actual delivery, by the issuing against it by the distiller, of so-called warehouse receipts. It was decided by this Court in the *Millbourne Mills Case*, 172 Fed. 177, that as to grain and flour in store, in the party's own warehouse, a valid pledge could not be made in this way, and that, having gone into bankruptcy, the invalidity of the transaction could be taken advantage of, in behalf of general creditors, by his trustee. And this was repeated in *First National Bank vs. Guaranty, Title and Trust Company*, 178 Fed. 187, as to machinery and book accounts, sought to be pledged by bill of sale and by assignment, the machinery being and remaining in the warehouse of the pledgor and the book accounts never having been reduced to possession by the pledgee. Unless these cases can be distinguished, they are decisive of the one in hand. It is sought to distinguish them, however, on the ground that, in the case of whiskey in a distillery warehouse, the goods are out of the possession and control of the owner being virtually bailed to the Government, and may therefore be pledged by a symbolical or constructive delivery, by any instrument by which they are identified, and the intent to pledge is shown. Delivery, actual or constructive, according to the character of the property, admittedly is imperative, and there being no actual delivery, the question is whether a substitute for it appears in the conditions here found.

It is enacted by Revised Statutes, Sec. 3271:

> "Every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid; but no dwelling house shall be used for such purpose, and no door, window or other opening shall be made or permitted in the walls of such warehouse leading into the distillery

or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper, assigned thereto by the Commissioner."

And it is further provided by Revised Statutes, Sec. 3274:

"Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. It shall be kept securely locked, and shall at no time be unlocked, or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse, except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse."

It was in a distillery warehouse of this description that the whiskey in controversy was stored.

A building erected by a distiller on the distillery premises pursuant to the statute, has none of the characteristics of a warehouse, where goods are received and stored for pay, as that term is understood and applied. *Bucher vs. Commonwealth*, 103 Pa. 523; *National Union Bank vs. Shearer*, 225 Pa. 470. And so denominating it only results in a confusion of terms. It is nothing more or less than a place where the products of the distillery may be securely stored, subject to the supervision of the officers of the Government under bond, until the taxes are paid. The arrangement is primarily for the convenience of the distiller, the spirits being allowed to age, and payment of the tax meantime being deferred, the Government being

protected by the bond given to the collector, and the assignment of a storekeeper to watch it, without whom nothing can go out or in. It may be that in accordance with the sections quoted, it is imperative on a distiller to erect on the distillery premises such a building as is there described. But it is provided by Act of August 27, 1894, Secs. 51, 52, 28 Stat. 564, that, in the discretion of the Internal Revenue Commissioner general bonded warehouses, not exceeding ten in number, may be established in each collection district, to which distilled spirits may be removed by a distiller from his distillery warehouse, under such regulations with regard to bonds, removal stamps, etc., as the commissioner may prescribe. And wherever bonded warehouses of this character exist, as was the case here, every distiller of the district has a place, entirely separate and distinct from his own establishment, where the product of his distillery can be removed and stored under bond, with the same advantage as if stored in a distillery warehouse of his own, and where they may be sold or pledged by means of warehouse receipts which cannot be questioned, without the necessity of resorting to receipts of his own, which are only such in name. In his own warehouse, by contrast, except only as they are in ward to the Government for payment of the taxes, the goods are practically in the distiller's own hands. The storekeeper is a mere watchman to see that they do not get away, and all the checks imposed and supervision provided for, are directed solely to that end. At any time, and as to any goods, the distiller may pay the tax and remove them, and there is nothing to stand in the way. No one else but the distiller, whatever his *indicia* of title, is recognized, and no one but he can intervene. The statute expressly declares that the goods are in the joint custody of the Government, storekeeper and the distiller, and the Government's custody necessarily ends when the purpose of it has been subserved, leaving that of the distiller supreme. Not only is this the law, but it is the established practice as well. The goods in the distillery warehouse being thus on the premises and

in the possession of the distiller, and, once the tax is paid, subject to his entire control, there is no place for a delivery, actual or constructive, necessary to complete a pledge. In no sense are the goods bailed to the Government, so as to permit constructive delivery to be made. The authorities are clearly opposed to any such idea. As is said in *United States vs. Thirty-six Barrels*, 7 Blatch. 459:

> "The Act nowhere in terms provides that the Government Inspector shall have any possession custody or control of the spirits, but only a custody of the warehouse, jointly with the owner. This is given to the inspector through his participation in the custody of the warehouse and by the discharge of his duty to keep the same locked, when not personally present, a means of guarding against illegal removal of spirits, but (it) invests him with no legal possession thereof. Whatever custody or control he has over the spirits is purely incidental, or a consequence of his joint custody of the place where they may happen to be, and he has not, as a legal proposition a custody of the spirits themselves. In point of law the owner of the spirits and the owner of the warehouse wherein they are stored is in possession of the spirits. All that the statute has done is to throw around his ownership, possession, custody and control, a surveillance and joint custody of the warehouse as an obstacle to the accomplishment of any fraud the owner may intend and desire to effect."

So in *Witten vs. United States*, 143 U. S. 76, where the distiller was held liable for the tax, notwithstanding that the spirits had been stolen, it is said:

> "Under the requirements of the Internal Revenue laws, the warehouse, was provided by the owner of the distiller at his own expense, and on his own premises, and although declared to be a bonded warehouse

of the United States, and required to be under the direction and control of the collector of the district, and in charge of a Government storekeeper, was in the joint custody of the storekeeper and the owner. The deposit of the spirits in the warehouse was solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax on the spirits instead of paying the tax at once. The Government assumed no responsibility to him for their safe-keeping."

The distillery warehouse, in the present instance, therefore, having none of the characteristics of a warehouse proper, and the supervision and control of the collector over the whiskey contained in it, in no sense constituting a bailment, the attempt to pledge it, by the issuing by the distiller of so-called warehouse receipts, was of no effect, no matter how specifically the property may have been described in them, nor how fully backed up by gaugers' certificates they may have been. It was held in *Union Trust Company vs. Trumbull*, 137 Ill. 146, that it is only as to goods in a public warehouse, that a symbolic delivery by means of warehouse receipts can be made; and that the warehouseman issuing the receipts must have the goods in his possession or control, to make the receipts amount to a delivery of the property for which they stand. And in *Conrad vs. Fisher*, 37 Mo. App. 352, where, as here, a distiller, in the attempt to create a pledge, issued receipts against whiskey in bond in his own warehouse, that the receipts were not good. Nor does the case of *Miller vs. Browarsky*, 130 Pa. 372, in any respect sustain the contrary view. The distiller there sold whiskey in his warehouse to the plaintiff, Miller, who took as evidence a receipted bill, but let the whiskey remain in the warehouse undisturbed for three years. And in the meantime, the distiller executed certificates, in the form of warehouse receipts, against a part of the same to a third party, who

transferred them to the defendant, who, from time to time, furnished money to the distiller to pay the tax, and got withdrawal orders from the collector, on which the whiskey was removed. The death of the distiller brought the conflicting claims to light. The plaintiff sued the defendant in trover and conversion, but it was held that he had no case. The plaintiff, it was said, left the whiskey in the absolute control of the distiller, when, by reasonable precaution, by notifying the collector, and his storekeeper of his claim, he might have put it beyond the power of the distiller to resell. It is doubtful whether mere notice to the officers of the Government would have had that effect. But, however, that may be, the fact remains, that, notwithstanding the sale to the plaintiff, and the receipted bill given to him for the goods, which being prior in time would be superior in right, if the matter was to go by receipts, it was held, that as against the defendant, who advanced money to get the whiskey out of bond, and took the goods, they were of no account. Neither is *Keil vs. Harris*, 5 Cent. Rep. 865, necessarily the other way. It was assumed in that case, that, by the deposit of the whiskey in the warehouse of the distiller, there was a bailment to the Government, which as we have seen, is not so, and it is upon this mistake in assumption that the case proceeded, but, in addition to that, the defendant, who held the certificates which were sustained, had paid the tax on the whiskey and procured it to be delivered to him, against which the plaintiff had merely an attempted levy and sale. Neither is the case within that of *Exchange Bank vs. Uhlman, Goldsboro Co.*, 5 Dist. (Pa.) 480, decided by the learned District Judge, when Judge of the Dauphin Common Pleas. The warehouse where the whiskey there was stored, was that of a third party, and not of the distiller, and the receipts by which the [illegible] was claimed, emanated from the independent st[illegible]es. These certificates were, therefore, rightly held to possess the ordinary characteristics of warehouse receipts, such as

negotiability, and etc., which makes out a very different kind of case. The same is to be said of *Young vs. Lambert*, L. R. 3 Privy Council, 142, where it was held that goods in a Canadian warehouse on deposit until the freight and custom charges had been paid, could be the subject of a valid pledge. This was expressly put, however, on the ground that the pledge had been communicated to the Customs officer, accepted by him, the goods, according to the entry made by him in his books, being placed at the disposal of the pledgee. The goods, when they were pledged, were thus out of the hands of the owners, in the Customs warehouse, and by the act of the Customs officer, who had control of them, they were held by him subject to the order of the party to whom they had been transferred; which bears no comparison to the situation here. Nor, rightly considered, is there anything in *McCullough vs. Large*, 20 Fed. 309, which militates against the views herein expressed. The whiskey there was deposited in a distillery warehouse, and taxes were due to the Government upon it, and all that was decided was, that it could not, under the circumstances, be levied on and sold by the Sheriff on execution against the distiller. It is true, that it is given as a reason, that the whiskey so deposited was virtually in the possession of the Government of the United States, held for Internal Revenue taxes, and that this possession could not be disturbed. But this, as it is to be remembered, was said with reference to the interference by the sheriff, by execution, with the goods held under bond to the Government for the tax, which, as it is pointed out the Sheriff was in no position to pay, as neither was he to comply with the provisions upon which a live loan could thus be withdrawn. There is no attempt to consider or define the relation of the distiller to the goods, nor the relative position of the Government and the distiller thereto, which was not involved. Comparison in this connection is to be made with what is said on the subject in *United States vs. Thirty-six Barrels*, 7 Blatch. 459, and

United States vs. Witten, 143 U. S. 76, referred to above, where this is done.

It is said that there is a custom in the distillery business to issue certificates against spirits under bond in distillery warehouses, by means of which they are freely sold and pledged, and that serious consequences will follow if this is not upheld. When the spirits are in the warehouse proper, either such as is provided by Act of Congress, or recognized by the State law, so that it be not that of the distiller himself, such certificates no doubt are good. But where the goods are in the distiller's own hands, and the attempt is made to sell or pledge them by so-called warehouse certificates or receipts, issued by the distiller alone, the custom relied on flies in the face of the law, and cannot be observed. A possibility of duplication and fraud, of which there are examples enough in the books, to say nothing of what is reported to have occurred here, is sufficient to condemn the custom if there was nothing more. But, without resting on this, the goods against which said certificates are issued being in the distiller's own hands at the time, and (save only that the taxes must be paid) being under his complete control, there is no such delivery, either actual or constructive, by the mere putting out of receipts, as the law requires, to make an effective sale or pledge. The specification of the goods, in the same terms in which they are described in the storekeeper or gauger's books, does not help out the receipts. It is not a matter of description, but of control. And neither does the attaching of gauger's certificates, which are merely evidence that the goods are there. The gauger's certificates neither convey title, nor bind the goods, nor do they necessarily check the duplication of receipts. Neither gauger, storekeeper, or collector, when once the taxes have been paid, can restrain the distiller, no matter what receipts or certificates are known to be out, from disposing of the goods in the distillery warehouse to whomsoever he may choose. And this is the whole case.

The Judgment is reversed, and the report of the Referee dismissing the petition of the Penn National Bank is confirmed.

LANNING, *Circuit Judge,* (concurring): I think the law distinguishes between the relation of a distiller to spirits manufactured by him, and stored by him in a distillery warehouse erected on his own distillery premises for his sole use, and his relation to spirits manufactured by him and stored by him in a general bonded warehouse erected by some other person on other premises for the use of distillers generally. The distiller can obtain from no other person warehouse receipts for his spirits stored in his own distillery warehouse, for there is no other person in possession of the spirits to give the receipts; but he may obtain such receipts from the proprietor or operator of a general bonded warehouse for the spirits he has stored therein, and by transferring the receipts he may make constructive delivery of the spirits therein described. While section 3271 of the Revised Statutes declares that a distillery warehouse "shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper assigned thereto by the Commissioner," and section 3274 declares that "every such distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof," just as it declares of general bonded warehouses in section 51 of the Act of August 27, 1894, and while there are cases which speak of the possession of the Government when considering the attempt of a sheriff to levy on the spirits therein stored, the true relation of the Government to spirits stored either in a distillery warehouse or in a general bonded warehouse is, I think rather that of a policeman to prevent removal of the spirits before payment of the Government tax than that of a bailee. In the present case, the so-called warehouse receipts were issued by the distiller itself for spirits stored by it in its own distillery warehouse.

Each of the receipts had, at its head, the language "United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company," declared in the body of the receipt that the spirits therein described had been "received on storage from ourselves," and was signed "Miller Pure Rye Distilling Co., S. V. Nagle, President." These instruments therefore showed on their faces that the spirits therein described were in fact, as well as in law, in the possession of the distiller, and not the Government. Such instruments are not generally regarded as valid warehouse receipts by the commercial law, and they gave no lien to the Penn National Bank under the law of Pennsylvania, as I understand that law. I therefore concur in the opinion of Judge Archbald.

BUFFINGTON, *J.*, (dissenting.) The opinion of the Judge in the court below, reported at 176 Fed. Rep. 608, is so clear that it suffices me to rest on it as the substantial ground of my dissent. That opinion demonstrates, first, that the federal statutes give the exclusive physical possession of untaxed distilled spirits in a Government warehouse to the Government; that its storekeeper and lock exclude the distiller from entry to or possession of such spirits; and secondly, that under the law of Pennsylvania, an owner of personal property which is already in the exclusive possession of a third person can sell or pledge it without delivery of possession. The majority opinion avoids the application of this recognized Pennsylvania principle on the ground the distiller is in possession of the spirits. That opinion says:

> "The goods in the distillery warehouse being thus on the premises and *in the possession of the distiller*, and once the tax is paid, subject to his entire control, there is no place for a delivery actual or constructive, necessary to complete a pledge. In no sense are the goods bailed to the Government so as to permit a constructive delivery to be made."

The fact that the goods are "in the possession of the distiller" is the basis of the opinion and if that assumed basis does not exist, what is built thereon has no support. Now that in physical fact and Federal law the goods in the distillery are not "in the possession of the distiller," is to my mind demonstrated by the Judge of the court below who in his opinion, says:

> "It is true that the Government was not a formal and technical bailee of the whiskey, but its possession and control were of such a character as not to be distinguishable in effect from possession and control under a bailment. Whiskey in a bonded warehouse is in a peculiar situation. Usually, the title is in the distiller, and it is also true that for certain purposes he may be said to have some degree of possession, custody or control. At all events, he comes within the terms of a statute which subjects spirits to forfeiture if they be found in 'the possession or custody or within the control of any person or persons for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws or with design to avoid the payment of such taxes.' *United States vs. 36 Barrels of High Wines*, Fed. Cas. No. 16,468, 7 Blatchf. 459. But the subject must now be approached from a different point of view. How are the general creditors of a distiller affected by the situation and surroundings of spirits belonging to him and stored in his bonded warehouse? Does the distiller appear to be the owner? Has he such apparent possession as indicates the power to dispose of the property freely? Does he obtain a false credit by seeming to have the sole right to sell or pledge? As creditors are bound to take notice of the federal statutes governing a bonded warehouse, let us look at the provisions that are now relevant.
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> "A distiller is required to provide at his own expense a warehouse in which nothing but spirits may be stored. The warehouse must have no doors or

windows leading into the distillery or into any other room or building and must be under the direction and control of the collector of the district and in immediate charge of a storekeeper who is assigned to this duty by the Commissioner of Internal Revenue. In this warehouse the spirits may remain for eight years, but they may be withdrawn at any time during that period. 2 U. S. Comp. St. 1901, p. 2122. If the Commissioner thinks the warehouse unsafe or unfit for use, he may require the distiller to provide another and to remove the spirits at his own expense. Id. 2123. The warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete and practically exclusive. The lock is put on by the Government and the key is in the storekeeper's posession. The warehouse must not be unlocked or opened or remain open except in the presence of the storekeeper or his lawfully designated representative, and no articles may be received or taken out except by the collector's order addressed to the storekeeper. Id. 2124. Any revenue officer at any hour of the day or night may enter the building to examine gauge, measure, and take account of the spirits. Heavy penalties are denounced if his attempt to enter is obstructed by the distiller. Id. 2125. Immediately upon distillation the spirits must be placed in the warehouse. Careful regulations provide what kind of packages may be used, and regulate their brands and stamps. Id. 2130, 2132. A formal entry that the spirits have been deposited in the warehouse must be made with the collector, the storekeeper and the commissioner, and a bond for the payment of the tax must accompany the entry. Id. 2133. Immediately after the tax has been paid, the spirits must be removed under penalty of forfeiture. Id. 2132. This removal is carefully guarded, and can only take place on the collector's order. Id. 2135, 2136. There are heavy penalties for removing spirits from the ware-

house except as provided by law, and these penalties may be inflicted although no intent to defraud may exist. Id. 2136."

To hold, in the face of the physical facts of a government storekeeper and government lock and keys provided by federal statutes that the whiskey is in the possession of the distiller because the distiller owns the bonded warehouse is equivalent to telling a man he is at liberty because the room in which he is locked is in a house he owns. Indeed, it seems to me the distiller cannot be said to be in possession of his property when he could be put in prison for attempting to take possession of it.

The law of Pennsylvania is fully referred to by the court below. The principle established by the decisions of that State, beginning with *Linton vs. Butz*, 7 Pa. St. 47, and running through *Morman vs. Kramer*, 73 Pa. St. 385; *Woods vs. Hull*, 81 Pa. St. (32 P. F. S.) 451; *Stephens vs. Gifford*, 137 Pa. St. 219, is thus summarized in the last case; "The retention of possession by the debtor of that which he has sold misleads his creditors and therefore is conclusively fraudulent as to his creditors. But where the chattel is in the actual physical possession of another than the debtor at the time of the transfer no creditor can be misled to his hurt." Accordingly it was held in Linton vs. Butz, *supra*, "Here, at the sale, the article sold was not in the possession of the vendor but in the hands of another as bailee; and the vendor did not take it again into his own possession. Hence the property being in the hands of the bailee the only possession was given of which it was susceptible. This is all that is required." It is of course true that in many Pennsylvania cases the prior possession was under a bailment, but the vital question before us in this case is not the particular character of holding, but the fact of exclusive holding. If the goods are not in the possession of vendor or pledgor. creditors are not misled, and because he has no possession

to mislead, the law permits a vendor or pledgor out of possession to sell or pledge without delivery of possession. Now so completely out of possession with relation to his creditors is the owner of goods in a bonded warehouse, and so absolutely is the United States in exclusive possession with relation to creditors that they cannot levy upon them even though they offer to pay the duties as in *Fischer vs. Dadistal*, 9 Fed. Rep. 145,—a case in this circuit decided by Judge McKennan and Judge Butler—or to pay the taxes as in *McCullough vs. Large*, 20 Fed. Rep. 310, also a case in this circuit decided by Mr. Justice Bradley and Judge Acheson. Now, what the nature of this possession was as between the Government and the distiller, whether it was a bailment or otherwise, is not the crucial question in the present inquiry for here the rights of creditors are involved, and cases like *United States vs.* 36 *Barrels*, No. 16,468, and *United States vs. Witten*, 143 U. S. 76, in which creditors were not involved but in which the relative rights of the Government and the distiller alone arose, must be read with that in view. In the former it was decided that a distiller was in possession of the goods so as to subject them to forfeiture under section 48 of the Act of June 30, 1864 (13 Stat. 240), and the opinion carefully confines itself to that precise question, saying: "the inquiry into the possession, or custody or control, *is not because possession, control or custody is material for any purpose, except as the means of identifying the person whose fraudulent intent or design is the cause of the forfeiture.*" In United States vs. Witten, *supra*, whiskey was stolen while in a government warehouse, and it was sought to defend against a bond given for the tax because the storekeeper was negligent and the warehouse insufficiently protected. But the Court refused to hold the government to such a measure of responsibility, holding, and this is significant as asserting the exclusive control of the government through its storekeeper, "the only duty which the revenue officer owed in regard to the security of the ware-

house and the safekeeping of the spirits therein, was to the Government and not to the defendants." But in our case the question is as to rival creditors and the owner being out of custody, control and possession, the law of Pennsylvania will not forbid him to validly pledge his whiskey because the federal law deprives him of the right of formally delivering a possession he does not have, cannot deliver or surrender and cannot use to mislead. If then this pledge was valid against creditors and subsequent purchasers, it was undoubtedly good as between pledgor and pledgee, and the assignee in bankruptcy simply succeeded to the rights of the bankrupt; *York vs. Cassell,* 201 U. S. 344. I am therefore constrained to record my dissent first because the majority opinion is at variance with the decisions of the Supreme Court of Pennsylvania; second, it is not in harmony with the federal decisions of this circuit in bonded warehouse cases; third, its practical effect is to cripple the distilling interest by preventing sale or pledge of product in bond, and to overturn a widespread and long recognized commercial practice.